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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

AVAAK, INC.,

Plaintiff, Cross-defendant and
Appellant,

GIOIA MESSINGER,

Cross-defendant, Cross-complainant
and Appellant,

v.

PHIL SHI,

Defendant, Cross-complainant and
Respondent.

D052687

(Super. Ct. No. GIC876629)

APPEAL from an order of the Superior Court of San Diego County, Jay M.

Bloom, Judge. Affirmed.

AVAAK, Inc. (AVAAK) and its Chief Executive Officer, Gioia Messinger
(Messinger) (collectively appellants), appeal from an order denying a special motion to

strike an action as a "SLAPP" (strategic lawsuits against public participation) suit under the anti-SLAPP statute, the Code of Civil Procedure section 425.16¹. We affirm.

FACTS

Appellants filed a first amended complaint against Phil Shi, a former employee, alleging the following causes of action: breach of contract; breach of duty of confidentiality; breach of covenant of good faith and fair dealing; misappropriation of trade secrets; breach of fiduciary duty; conversion; constructive fraud; intentional misrepresentation; unjust enrichment; and false promise. Appellants sought damages, an accounting, injunctive relief and imposition of a constructive trust.

Shi filed a cross-complaint alleging invasion of privacy under the California Constitution; violation of the Electronic Communication Privacy Act (18 U.S.C. § 2510 et seq.) and the Stored Communications Act (18 U.S.C. § 2701 et seq.); conversion; libel, and slander. He further alleged that from October 2005 to September 2006 he was an AVAAK employee. On approximately October 2, 2006, days after his termination, someone at AVAAK accessed his private email account without his knowledge or permission, deleted many of his email messages, and forwarded them to Messinger and AVAAK's attorney. The cross-complaint alleged Shi "has never signed any waivers to his right to privacy." Moreover, he "had no reason to expect that his personal email account could be compromised by cross-defendants as it is password protected and was

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

created only for personal use by [Shi]. The email account is physically located on computer servers run by Yahoo.com." The damage Shi allegedly suffered was a loss of "records of emails and attachments thereto saved in his email account, which contained personal correspondences and are of sentimental, scientific and academic value to him. [He] also lost emails that may have economic value."

AVAAK filed a special motion to strike the cross-complaint. Messenger's declaration differed regarding the chronology of events, and stated that before Shi was terminated Messenger found on AVAAK's printer a partial business plan that Shi had prepared for a different company. Messenger checked Shi's computer and read his emails, which showed violations of AVAAK's non-disclosure and non-solicitation policies. Accordingly, AVAAK terminated Shi's employment. Messenger forwarded Shi's emails to AVAAK's attorney.

The trial court granted the special motion to strike as to the libel and slander causes of action only. The trial court ruled that the gravamen of the remaining causes of action "is not that Shi's confidential emails were sent to AVAAK's attorney and then published in a complaint, but is the alleged unauthorized access to and subsequent loss of his private emails." Appellants disagree, contending AVAAK engaged in the protected activity of accessing Shi's emails and sharing them with AVAAK's attorney in preparation for litigation.² We affirm.

² Shi's motion to augment the record on appeal filed on December 5, 2008, is granted.

DISCUSSION

The Legislature enacted section 425.16 to deter lawsuits "brought primarily to chill the valid exercise of the constitutional rights of freedom of speech and petition for the redress of grievances." (§ 425.16, subd. (a).) "Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought ' "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." ' " (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 312.) To achieve the goal of encouraging participation in matters of public significance, the statute must be construed broadly. (§ 425.16, subd. (a); *Kibler v. Northern Inyo County Local Hosp. Dist.* (2006) 39 Cal.4th 192, 195.)

A court engages in a two-step process to determine whether an action is subject to a special motion to strike. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88 (*Navellier*); *Taus v. Loftus* (2007) 40 Cal.4th 683, 712.) "First, the court decides whether the defendant [or cross-defendant] has made a threshold showing that the challenged cause of action is one arising from protected activity. [Citation.] 'A defendant meets this burden by demonstrating that the act underlying the plaintiff's cause fits one of the categories spelled out in section 425.16, subdivision (e)[.]' " (*Navellier*, at p. 88.)

If the court finds that the first prong is satisfied, "it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." The cause of action must satisfy both prongs to be stricken under the statute. (*Id.* at pp. 88, 89.) If the defendant does not demonstrate the first prong, the court should deny the Anti-SLAPP

motion and need not address the second prong. (*City of Riverside v. Stansbury* (2007) 155 Cal.App.4th 1582, 1594.)

Subdivision (e) of section 425.16 sets out four categories of activities that are "in furtherance of" a defendant's free speech or petition rights under the United States or California Constitution in connection with a public issue. Relevant here are those acts set forth in subdivision (e)(2): "any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law" and subdivision (e)(4): "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest." (§ 425.16, subd. (e).)

We independently review the order denying AVAAK's special motion to strike. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3; *Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1396.) We consider " 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' [Citation.] However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the [cross-complainant] [citation] and evaluate the [cross-defendant's] evidence only to determine if it has defeated that submitted by the [cross-complainant] as a matter of law.' " (*Soukup*, at p. 269, fn. 3.) When "a cause of action alleges both protected and unprotected activity, the cause of action will be subject to section 425.16 unless the protected conduct is

'merely incidental.' " (*Mann v. Quality Old Time Service, Inc.* (2004) 120 Cal.App.4th 90, 103.)

Article I, section 1 of the California Constitution guarantees a right to privacy. A plaintiff alleging an invasion of privacy in violation of the state Constitution must establish each of the following: "(1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by a defendant constituting a serious invasion of privacy." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 39-40.) A defendant may prevail in a state constitutional privacy case by negating any of those three elements or by "pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy rights." (*Id.* at p. 40.)

"Conversion is generally described as the wrongful exercise of dominion over the personal property of another. [Citation.] The basic elements of the tort are (1) the plaintiff's ownership or right to possession of personal property; (2) the defendant's disposition of the property in a manner that is inconsistent with the plaintiff's property rights' and (3) resulting damages." (*Fremont Indemnity Co. v. Fremont General Corp.* (2007) 148 Cal.App.4th 97, 119.)

The Electronic Communication Privacy Act prohibits the intentional interception of electronic communication and the disclosure and use of the contents of such communication. (18 U.S.C. § 1511, subd. (1)(c)-(e).) Violation of this statute is

punishable by a fine or imprisonment for up to five years, or both. (18 U.S.C. § 2511, subd. (4)(a).) Under the Stored Communications Act, it is an offense to "intentionally assess[] without authorization a facility through which an electronic communication service is provided." (18 U.S.C. § 2701, subd. (a)(1).) Whoever thereby "obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished" by a fine or imprisonment for not more than [five] years, or both" for a first time offense. (18 U.S.C. § 2701, subds. (a)(2),(b)(1)(A).)

We conclude the gravamen of Shi's causes of action for invasion of privacy, conversion, violation of the Electronic Communication Privacy Act and the Stored Communications Act was that appellants breached Shi's privacy by accessing his emails, and subsequently deleting them. Appellants failed to make a prima facie showing that these causes of action were brought to chill their First Amendment rights. Although Shi's emails were eventually forwarded to AVAAK's attorney for use in litigation, that conduct was incidental to Shi's causes of action. Shi's emails "were not created 'before' or 'in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law.'" [Citation.] The underlying lawsuit does not fall within the anti-Slapp suit description." (*People Ex Re. 20th Century Ins. Co. v. Building Permit Consultants, Inc.* (2000) 86 Cal.App.4th 280, 284-285.) The burden of showing a probability of prevailing on the claims never shifted to Shi and we need not discuss the second prong of section 425.16. (*Applied Business*

Software, Inc. v. Pacific Mortgage Exchange Inc. (2008) 164 Cal.App.4th 1108, 1118-1119.)

DISPOSITON

The judgment is affirmed. Phil Shi is awarded costs on appeal.

O'ROURKE, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.